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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 926

EDGAR J. OEMIG, SR., *Petitioner*,

v.

JAMES W. OEMIG, JR., and ROBERT C. OEMIG, Executors of the Will of CHARLES H. OEMIG, Deceased, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statute and Rules involved	2
Statement of the case	4
Argument	5
Differences among the circuits	6
Judicial definitions of excusable neglect	7
Deciding cases on the merits	9
Substantial questions of law involved	10
Settlement negotiations in progress	11
Appellant ill at critical time	12
Cost of writing up record to docket appeal	12
Conclusion	13
Appendix:	
Orders of the United States Court of Appeals for the District of Columbia Circuit, dated October 17, 1960, December 15, 1960, and January 26, 1961	1a, 2a
Affidavit of Edgar J. Orme, Sr.	3a

CITATIONS

CASES:

Citizens Protective League v. *Clark*, 278 F. 2d 556	8
De Sosta v. *Nehi Corp.*, 171 F. 2d 696	9
Fleming v. *Huebsch Laundry Co.*, 159 F. 2d 581	9
Gunther v. *duPont*, 255 F. 2d 710	7
Hoffman v. *Textile Machine Works*, 28 F. Supp. 431	9
Ispass v. *Pyramid Motor Freight Corp.*, 152 F. 2d 619	7, 9

Page

Ledwith v. *Storkan*, 2 FRD 539 9
Lurk v. *U.S.*, No. 490 Misc., Oct. Term 1960, Cert. Granted 365 U.S. 802 10
Martin v. *Handy Andy Community Stores*, 214 Fed. 10 8
Pyramid Motor Freight Corp. v. *Ispass*, 330 U.S. 695 (1947) 7
Renick v. *Lehigh Valley R.R. Co.*, 11 FRD 76 9
Rosario v. *U. S.*, 106 F. 2d 844 11
Schram v. *O'Connor*, 2 FRD 192 9
Stumpf v. *Matthews*, 195 F. 2d 25 8
U. S. v. *Bollman*, 73 F. 2d 133 11
U. S. ex rel. Robinson v. *Bar Assn. of the District of Columbia*, 197 F. 2d 409 9
U. S. v. *Gallagher*, 151 F. 2d 556 8

UNITED STATES CONSTITUTION:

Article III 10

STATUTES:

Act of June 25, 1948, C. 646, 62 Stat. 961, 28 USC 2071 2
28 USC 211 10

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 73 (a) 2, 6
Rule 73 (g) 3, 4
Rule 81 (a) 3

UNITED STATES CIRCUIT COURTS OF APPEALS RULES:

District of Columbia Circuit, Rule 32 (b) (2) 4, 8, 12
2nd Circuit, Rule 14 (b) 8, 9

IN THE

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OCTOBER TERM, 1960

No.

EDGAR J. ORME, SR., *Petitioner*,

v.

JAMES W. ORME, JR., and ROBERT C. ORME, Executors of the Will of CHARLES H. ORME, Deceased,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carl L. Shipley and Thomas A. Ziebarth on behalf of Edgar J. Orme, Sr., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above captioned case dismissing petitioner's appeal.

OPINION BELOW

The decisions and orders of the court below are set out at page 1a *et seq.* of the Appendix hereto.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 USC 1254 (1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred in ruling that the facts and circumstances surrounding petitioner's failure to docket an appeal and file the record after timely notice of appeal from a judgment of the United States District Court for the District of Columbia, did not constitute "excusable neglect" within the meaning of the Federal Rules of Civil Procedure, as promulgated by the Supreme Court of the United States.

STATUTE AND RULES INVOLVED

The Act of June 25, 1948, C. 646, 62 Stat. 961 as amended, 28 U.S.C. Sec. 2071 provides:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 73 (a) of the Federal Rules of Civil Procedure provides in pertinent part:

> "When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of judgment appealed from * * *"
>
> "A party may appeal from a Judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed

from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule, or when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant."

Rule 73 (g) of the Federal Rules of Civil Procedure provides:

"Docketing and Record on Appeal. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the appeal there docketed within 40 days from the date of filing the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal."

Rule 81 (a) of the Federal Rules of Civil Procedure provides in pertinent part:

"These rules * * * do not apply to probate, adoption, or lunacy proceedings in the United States District Court for the District of Columbia *except to appeals therein.*" (Emphasis supplied)

Rule 32 (b) (2) of the Rules of the United States Court of Appeals for the District of Columbia Circuit provides:

> "(b) ENLARGEMENT. When by these rules or by order of this court an act is required or allowed to be done at or within a specified time, the court or a judge thereof for cause shown may (except where the time is also fixed by statute), at any time in the discretion of the court or a judge thereof, * * * (2) upon motion permit an act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect."

STATEMENT OF THE CASE

Petitioner is caveator of the will of Charles H. Orme, deceased, and appellant in the same matter on appeal before the United States Court of Appeals for the District of Columbia Circuit.

The matter was disposed of by means of a directed verdict in favor of respondents in the United States District Court for the District of Columbia on June 6, 1960. Notice of Appeal was filed on June 24, 1960, within the time specified by the Federal Rules of Civil Procedure.

Pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure, the appeal should have been docketed and the record filed on or before August 3, 1960, unless there was justifiable reason for not so doing.

On August 8, 1960 respondents filed a motion to docket and dismiss for petitioner's failure to docket his appeal, file the record, or post a bond for costs. Petitioner filed an opposition to this motion on August 10, 1960, and on the same day filed his motion for leave to file the record and docket the appeal out of time on

grounds of "excusable neglect" resulting from continuing negotiations for settlement, which would have avoided further litigation and the expense of having the record written up for filing at the time the appeal was docketed.

On October 17, 1960, the Court granted respondents' motion to docket and dismiss and denied petitioner's motion for leave to file the record and docket the appeal out of time without prejudice to petitioner's making a showing of "excusable neglect".

On October 20, 1960, pursuant to leave granted by the Court, in its order of October 17, 1960, petitioner renewed his motion for enlargement of time within which to file record and docket appeal, and supplied additional data and an affidavit setting forth in detail the facts and circumstances amounting to "excusable neglect" within the meaning of the Federal Rules of Civil Procedure.

On December 15, 1960, the Court again denied petitioner's motion, and on January 26, 1961 both the Division of the Court which originally heard the motions and the full Court *en banc* denied peteitioner's petition for rehearing.

ARGUMENT

The decision of the court below raises the substantial question of whether a caveator, after timely filing his notice of appeal from an adverse decision of the United States District Court for the District of Columbia, shall be penalized by an outright dismissal of his appeal for neglecting to accomplish the purely ministerial acts of filing the record and docketing the appeal within the 40-day specified period, when there

is "excusable neglect" for not so doing, growing out of bona fide and continuing settlement negotiations with a substantial chance of success, and when the cost of having the record of testimony on which the trial court directed a verdict against petitioner typed up would have been substantial.

Under Rule 73 (a) of the Federal Rules of Civil Procedure, a party may:

> ". . . appeal from a judgment by filing with the District Court a notice of appeal," and "(f)ailure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal . . ."

Petitioner filed a timely notice of appeal, and the only issue before this Court is whether the facts and circumstances surrounding petitioner's omission to docket the appeal and to take the necessary additional steps in time amounted to "excusable neglect" on his part as a matter of law, and if there exist substantial questions which should have been decided on the merits.

If this Court determines that such is the case, then the court below committed a manifest and arbitrary error in dismissing the appeal on a technicality, and thereby precluding a judicial review on the merits of a verdict directed by the trial judge before the case was submitted to the jury.

Differences Among the Circuits

Rules 73 (a) and (g) of the Federal Rules of Civil Procedure allow the Courts of Appeal in their discretion to permit the docketing of an appeal and filing of the record after expiration of the time specified in that rule.

In the case of *Ispass* v. *Pyramid Motor Freight Corp.*, 152 F. 2d 619 (CA-2, 1945), Judge Swann noted that, although the notice of appeal had been filed March 29, 1945, nothing was done to further perfect the appeal until July 20, 1945, when appellant sought and obtained an order from a judge of the Second Circuit Court of Appeals extending the time within which to file the record on appeal. Nevertheless, speaking for the court, he said,

"* * *

"In the case at bar, there was no abuse of discretion in extending the time, despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment. * * *"

This Court granted certiorari to Pyramid Motor Freight Corp., *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695 (1947) and Mr. Justice Burton quoted the above statement from Judge Swann's opinion with approval saying,

"* * *

"We interpret the statement as no more than a recognition by the court that the substantiality of the question to be at issue on the merits of the appeal was a matter appropriate for its consideration with all the other circumstances before it. Rule 73 (a) is intended to place reliance upon the sound discretion of the Circuit Court of Appeals. We see no reason to question the discretion exercised in this case, as evidenced by the agreement of all of the five Circuit Judges to whom the issue was presented. * * *"

In other circuits the courts have exercised this discretion to dismiss sparingly if at all. In *Gunther* v. *du Pont*, 255 F. 2d 710, (CA-4, 1958), the court dis-

missed because there was no substantial issue to be raised on appeal. On the other hand in *Martin* v. *Handy Andy Community Stores*, 214 F. 2d 10, (CA-5, 1954), the court simply declined to dismiss without discussion. In *Stumpf* v. *Matthews*, 195 F. 2d 25, (CA-DC, 1951), the court declined to dismiss saying this discretionary power should be exercised "sparingly." However, it noted that there was no personal neglect on the part of appellant, and that a substantial question of law existed. In *U. S.* v. *Gallagher*, 151 F. 2d 556 (CA-9, 1945), appellant was 14 days late in applying for leave to docket an appeal out of time and the court dismissed the appeal. In *Citizens Protective League* v. *Clark*, 178 F. 2d 703 (CA-DC, 1949), the court dismissed when the grounds recited for "excusable neglect" were that appellant's attorney was busy with other matters.

In view of this widely varying application among the several circuits, it is essential for the orderly and uniform application of the rules that the same criteria apply in all the circuits. Even the local court rules underscores this variance.

In the Second Circuit Rule 14 (b) requires that there be a showing:

"* * *

(2) That the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal."

The District of Columbia Circuit appears to require even less in Rule 32 (b) where the Court may,

"* * *

(2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect."

Yet, despite the more stringent criteria in the 2nd circuit, *Ispass* was permitted to proceed while in the instant case, petitioner's motion was dismissed.

Judicial Definitions of Excusable Neglect

Courts have found a variety of circumstances constituting "excusable neglect." Examples are: *U. S. ex. rel. Robinson* v. *Bar Assn. of the District of Columbia*, 197 F. 2d 409,—where a party inadvertently sent his pleadings to the wrong court; *Eleming* v. *Huebsch Laundry Co.*, 159 F. 2d 581,—ignorance of law and facts on the part of defendant. *De Santa* v. *Nchi Corp.*, 171 F. 2d 696,—counsel's misunderstanding of the meaning of one of the Federal Rules. See also *Schram* v. *O'Connor*, 2 F.R.D. 192, *Ledwith* v. *Storkan*, 2 F.R.D. 539, *Resnick* v. *Lehigh Valley R.R. Co.*, 11 F.R.D. 76 and *Hoffman* v. *Textile Machine Works*, 28 F. Supp. 431.

Deciding Cases on the Merits

The objective of legal procedure is the determination of issues on their merits, rather than upon refinements of procedure. *Ledwith* v. *Storkan*, 2 F.R.D. 539. In the instant case, the trial court directed a verdict against petitioner. By denying petitioner's motion for leave to docket the appeal and file the record, the court below has denied petitioner an opportunity for review of the merits of his case. This is especially prejudicial, because a directed verdict is an *ex parte* interposition of the trial judge's view of the

facts and law in derogation of petitioners constitutional right to a jury trial. Petitioner would have presented to the Court of Appeals questions of law, such as whether the trial court judge erred in directing a verdict on the basis of the evidence before him, after settlement negotiations between the parties proved unsuccessful.

Substantial Questions of Law Involved

There would have been presented to the U. S. Court of Appeals for the District of Columbia Circuit substantial questions of law had petitioner been permitted to go forward.

Petitioner's trial in the U. S. District Court was presided over by Judge Joseph R. Jackson, who retired from the Court of Customs and Patent Appeals in 1952 before the enactment of the 1958 amendment to 28 U.S.C. 211 which declared that court to be one established under Article III of the United States Constitution. The issue of whether a retired legislative court judge may constitutionally be assigned to preside over a matter in an Article III court is now before this Court in the case of *Lurk* v. *U. S.*, No. 490 Misc. October Term 1960, cert. granted 365 U.S. 802 (1961). Since the case was not permitted to go to the jury, and since there are many factual issues which were never resolved, it would be manifestly unjust to deny petitioner an opportunity for a judicial review on the merits. And especially unjust to permit respondents to prevail on a technicality as to timeliness of docketing the appeal, when there exists such a substantial a question of law as whether there is such an absence of genuine issues of material fact as to justify a directed verdict in a will caveat case, which, by its

very nature turns on such evidentiary jury facts as undue influence, fraud, duress, mental competency and related matters.

Settlement Negotiations in Progress

During the latter part of July and early part of August, 1960, petitioner's attorney and respondents' counsel were engaged in serious negotiations with a view towards amicable settlement of the case. These negotiations are described fully in the affidavit of Carl L. Shipley in support of petitioner's motion for extension of time within which to file record and docket appeal, dated October 20, 1960, and the exhibits appended thereto. (Record, pages 20-35)

In the instant case, the fact of these "continuing negotiations," operates to toll the running of time within which an act must be done. Moreover, the law favors amicable settlement of disputes to avoid litigation, and a bona fide and reasonable expectation of success must, as a matter of law, be "excusable neglect" within the contemplation of the Federal Rules. In other types of judicial and quasi-judicial proceedings, there has long been recognized the doctrine of "continuing negotiations" which operates to toll the running of time within which a procedural act must be accomplished.

For example, in *Rosario* v. *U. S.*, 106 F. 2d 844 (CA-DC, 1939) the Court quoted with approval from *U. S.* v. *Bollman*, 73 F. 2d 133 (CA-8, 1934):

> ". . . So long as the bureau treats or acts in a manner which would lead the claimant reasonably to believe that it is holding the matter open, we think it would be unjust to regard it as closed by the first order. The bureau can at any time definitely

terminate such proceedings by stating that it declines to reopen and that its order is final."

So, too, in the instant case, the fact of continuing negotiations between counsel with a view to settlement, or at least the bona fide belief in the continuation of such negotiations by appellant's counsel, is a sufficient basis for a finding by the Court of "excusable neglect" for failure to request an enlargement of time under Rule 32 (b) (2) within which to file the record and docket the appeal.

Appellant Ill at Critical Time

In the course of the preparation of this petition, petitioner revealed to his counsel for the first time an additional reason why he was physically unable to reply to correspondence at the critical time. See the affidavit of Edgar J. Orme, Sr., page 3a of the appendix hereto. While not before the court below, this constitutes a further basis for a finding of "excusable neglect."

Cost of Writing Up Record to Docket Appeal

Not only was petitioner justified in assuming that neglect to docket the appeal herein was "excusable" neglect because of continuing and bona fide settlement negotiations in the light of the law's favorable view of such negotiations, but he was also reasonably justified in not incurring the substantial cost of having the record written up and occupying the administrative staff of the trial court with preparation of said record until such time as it appeared more likely then in that settlement negotiations would not be successful.

CONCLUSION

The purpose of the Federal Rules of Civil Procedure as set forth in the preface to the Committee's Report is

> "... to remove from Court proceedings in Federal Courts the 'sporting theory' of justice ..."

Petitioner respectfully submits that the United States Court of Appeals for the District of Columbia Circuit abused its discretion and erred as a matter of law in denying petitioner an opportunity to have his appeal heard on the merits, — ... when neglect to docket the appeal was excusable by any fair or reasonable standard and enlargement of the time within which petitioner might do so would not have prejudiced respondents in any way.

WHEREFORE, petitioner respectfully prays that this petition for a writ of certiorari be granted.

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